Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

R.R. DONNELLEY & SONS COMPANY,
*Petitioner*,

v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, STATE OF FLORIDA,
*Respondents*.

**Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a state sales and use tax on the purchase of new equipment, which exempts all manufacturers other than printing firms, is unconstitutional under this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

## PARTIES TO THE PROCEEDINGS

The petitioner in this case, appellant below, is R.R. Donnelley & Sons Company. Respondents in this case, appellees below, are Lawrence H. Fuchs, Executive Director of the Department of Revenue of the State of Florida, and the Department of Revenue of the State of Florida. Petitioner has no parent company. Petitioner has two subsidiaries that are not wholly owned: Stream International, Inc. and Metromail Corporation.

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IN THE

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No. 96-___

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R.R. DONNELLEY & SONS COMPANY,
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v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, STATE OF FLORIDA,
*Respondents*.

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**Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District**

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## PETITION FOR A WRIT OF CERTIORARI

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R.R. Donnelley & Sons Company ("Donnelley") respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, First District, in this case.

## OPINIONS BELOW

The order of the Supreme Court of Florida denying discretionary review is reported only as a table decision, 677 So. 2d 841 (Fla. 1996), and is reprinted at page 1a of the appendix to this petition. The opinion of the Florida Court of Appeal, First District, is reported at 670 So. 2d 113 (Fla. Ct. App. 1996), and is reprinted beginning at page 2a of the appendix. The opinion

of the Circuit Court of the Second Judicial Circuit, In and For Leon County, Florida, is unreported, and is reprinted beginning at page 9a of the appendix.

## JURISDICTION

The judgment of the Supreme Court of Florida denying discretionary review in this case was entered on July 1, 1996. The judgment of the District Court of Appeal of Florida, First District, was entered on March 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions at issue are the First Amendment to the United States Constitution, U.S. Const. amend. I, and Fla. Stat. §§ 212.05(1)(a), (b), 212.08(5)(b)1-2, 5. These provisions are reprinted in the appendix to this petition beginning at page 16a.

## STATEMENT OF THE CASE

This case presents a First Amendment challenge to a state statutory scheme that imposes a sales and use tax on the purchase of new equipment by the printing industry — including the publishers of newspapers, magazines, and books — to start or expand operations in Florida. That same tax is not imposed on the purchase of new equipment by any other manufacturers. The decision below upholding this tax is inconsistent with *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), which held that a state tax that singles out the press for disparate treatment can be sustained only upon a compelling justification. This Court's review is warranted in order to assure that the First Amendment protection accorded the press by cases such as *Minneapolis Star* is not undermined.

* * *

For some decades, the printing industry has sought to modernize its operations, and to make them more economical and efficient, by acquiring new equipment that will require fewer employees to set type, operate the presses, and otherwise produce

printed materials. Many have viewed this trend toward automation as essential to the survival of the printing industry and, indeed, of the print press as an institution.[1] This trend has not been without controversy, however, especially among unions and jurisdictions affected by the loss of printing jobs.[2] This controversy has apparently been reflected in the provisions of the Florida tax code at issue here, which have been crafted to deny to Florida printers, alone among all Florida manufacturers, a generally available tax exemption for the acquisition of new equipment. The denial of this exemption can significantly increase the cost of purchasing automated printing equipment. It increased the cost of the printing equipment purchased in this case by nearly two million dollars.

Petitioner R.R. Donnelley & Sons ("Donnelley") is a commercial printer with offices in 24 states and 21 foreign countries. Donnelley prints a wide variety of materials, including books, magazines, newspaper supplements, and financial materials. Among its publications are *Time, Newsweek, The New York Times Magazine, Foreign Affairs, Farm Journal, Nation's Business, Readers' Digest*, and *Good Housekeeping*.

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[1] *See, e.g.*, Howard Bray, *The Pillars of the Post* 251-89 (1980); United States Dep't of Commerce, *Printing and Publishing Industry Overview*, U.S. Industrial Outlook (Jan. 1994) (explaining that given the strains on the printing industry "[c]apital investment programs focus on increasing plant efficiencies, and have resulted in lowering the ratio of production workers to total employment to 53 percent in 1993 from 65 percent in 1973").

[2] *See, e.g.*, Gary Klott, *For Some, Job Anxiety is Justified*, Ft. Lauderdale Sun Sentinel, Mar. 3, 1996, at 3F ("As has been the case over the past decade, automation is expected to claim tens of thousands of additional factory jobs, including . . . various printing jobs, such as typesetters and paste-up."); Drew Von Bergen, *Union Leader Beaten in Re-election Bid*, UPI, July 27, 1984 (noting that "automation has supplanted thousands of jobs in the newspaper and printing industries over the past decade").

In 1990, Donnelley opened a printing plant in South Daytona Beach, Florida. Donnelley purchased a substantial amount of capital equipment for the plant, including printing presses, equipment to create printing plates, and machinery to cut, bind, and mail printed materials.

In 1993, Donnelley undertook a major expansion of the Daytona Beach plant. Donnelley then purchased and installed additional equipment, including a state-of-the art printing press.

Donnelley paid state sales and use taxes on both its initial 1990 capital purchases and its 1993 capital expansion. Donnelley then sought refunds from the Florida Department of Revenue under two parallel statutory provisions that provide an exemption from sales and use taxes for purchases of capital equipment to start or expand manufacturing operations. Fla. Stat. Ann. §§ 212.08(5)(b)1; 212.08(5)(b)2.

Under these provisions (collectively referred to here as the "manufacturing equipment exemption"), such equipment purchases are not subject to sales and use tax if:

(1) the taxpayer "manufacture[s], process[es], compound[s], or produce[s]" tangible personal property for sale;

(2) the taxpayer's operations are at a "fixed location" in Florida;

(3) the taxpayer uses the equipment to start a "new business" or to expand the productive output of an existing business by at least 10 percent; and

(4) the taxpayer purchases all of the equipment before the commencement or expansion of its operations, and receives all of the equipment within 12 months after the commencement or expansion of its operations.

It is undisputed that Donnelley's equipment purchases — both to start the Daytona Beach printing plant in 1990 and to expand that printing plant in 1993 — satisfied all of these requirements.

*See R.R. Donnelley & Sons* No. 93-4780, Circuit Court Record, Stip. ¶¶ 12, 14, 16-20, 28.

The Department of Revenue, however, denied Donnelley any tax exemption. The Department of Revenue relied on a separate subdivision of the same statute (the "printing exception"), which explicitly excludes "printing or publishing firms" from the manufacturing equipment exemption. Fla. Stat. Ann. § 212.08(5)(b)5. On November 9, 1993, Donnelley filed suit in Florida state court, challenging the printing exception of § 212.08(5)(b)5. Donnelley contended that this provision — by singling out the press for differential taxation and by irrationally taxing printers differently than similar industries — violated the First Amendment and the Fourteenth Amendment's Equal Protection guarantee, as well as equivalent state constitutional provisions.

The State attempted to defend § 212.08(5)(b)5 on the ground that it does not, by its terms, deny the manufacturing equipment exemption only to printing firms. However, although the exception also references eight other categories of businesses ranging from electric utilities to mining companies to hotels, the State did not dispute that printing companies are the only manufacturers which are actually affected by the exception.

The State's designated witness conceded at his deposition, moreover, that § 212.08(5)(b)5 has absolutely no effect on seven of these categories of businesses. The new equipment exemption, to which § 212.08(5)(b)5 provides an exception, applies only to purchases of equipment for use in producing tangible personal property. Six of the categories of businesses referenced in § 212.08(5)(b)5 do not produce tangible personal property.[3]

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[3] Petitioner deposed Jeffery Soff, the Department of Revenue's designated representative, on July 14, 1994. Mr. Soff explained that these other categories of businesses do not produce what the Department of Revenue defines as tangible personal property, and thus would not be entitled to the manufacturing equipment exemption in the first place. *See, e.g.*, Deposition of Jeffery Soff ("Soff Dep.") at 82-85

Accordingly, even if these categories of businesses were not included in § 212.08(5)(b)5, they still could not take advantage of the new equipment exemption.

A seventh category of businesses referenced in § 212.08(5)(b)5 — electric utility companies — is also unaffected by that provision. A separate statutory provision expressly exempts electric utility companies from taxes on their purchases of equipment. Fla. Stat. Ann. § 212.08(5)(c).

That leaves printing firms as the only manufacturers that are actually denied a tax exemption by § 212.08(5)(b)5 — and printing firms and restaurants as the only businesses of any type that are affected by § 212.08(5)(b)5. Both the Department of Revenue and the Court of Appeal have suggested that printing firms were denied the tax exemption because they are highly automated. App. 8a; Appellee's Answer Br. 23, *R.R. Donnelley & Sons Co. v. Fuchs*, No. 95-00769 (Fla. Ct. App., filed June 15, 1995). It has not been suggested, however, that the automation rationale applies to restaurants; nor could this rationale conceivably apply to the labor-intensive restaurant business.

After discovery, the case was submitted for decision on stipulated facts. The trial court sustained the statute (App. 9a), and the District Court of Appeal, First District, affirmed (App. 2a). The Court of Appeal acknowledged that an exception to a

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(communications companies do not produce tangible personal property and thus are ineligible for the exemption); *id.* at 88 (mining and mineral companies do not produce tangible personal property and thus are ineligible for the exemption); *id.* at 89 (oil and gas exploration and production companies do not produce tangible personal property and thus are ineligible for the exemption); *id.* at 90 (hotels do not produce tangible personal property and thus are ineligible for the exemption); *id.* at 92 (publishing companies, in contrast to printing companies, do not produce tangible personal property, but instead merely prepare materials for publication through, *e.g.*, layout and editing; they are therefore ineligible for the exemption).

tax exemption, if directed exclusively at the press, presents significant First Amendment concerns. App. 5a-6a (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 585; *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991)).

The court observed that the case law provides "little guidance" as to when a statute that singles out the press and another entity for unfavorable treatment may violate the First Amendment. App. 6a. The court noted that several categories of businesses other than the press are mentioned in § 212.08(5)(b)5, asserting that "there is some dispute concerning the applicability [of the exception] to other groups." App. 6a. However, solely because § 212.08(5)(b)5 applies to restaurants as well as to printers, the court declined to hold the provision unconstitutional. App. 6a-7a.

Turning to the equal protection claim, the Court of Appeal suggested that the state legislature chose to accord less favorable tax treatment to the printing industry than to other industries because "a modern printing plant such as Donnelley's requires a large investment in machinery, but is highly automated." App. 8a. The court concluded that "[t]he Legislature could well have determined that this state of facts did not warrant extending the exemption to printing or publishing firms" and that such a decision would have been sufficiently rational to withstand an equal protection challenge. *Id.*

The Florida Supreme Court denied discretionary review on July 1, 1996, with one justice dissenting. App. 1a.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE MASSACHUSETTS SUPREME JUDICIAL COURT BY PERMITTING DISCRIMINATORY TAX TREATMENT OF THE PRESS

The State's decision to single out the press — alone among all manufacturers in Florida — for taxation of new equipment purchases violates the First Amendment. This Court has made clear that, while the press is not exempted by the First Amendment from "generally applicable" state taxes, the press cannot be singled out for unfavorable tax treatment absent "an overriding governmental interest." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582-83 (1983); *accord Grosjean v. American Press Co.*, 297 U.S. 233, 244-45 (1936).

In *Minneapolis Star*, the Court invalidated a state use tax on the paper and ink used in printing newspapers and magazines. The tax subjected the press, unlike other manufacturers, to a tax on items used in the production of retail goods. 460 U.S. at 577. Justice O'Connor, writing for the Court, explained why taxes that are targeted at the press — and thus are not subject to "the political constraints that prevent a legislature from passing crippling taxes of general applicability" — present significant First Amendment concerns: The mere threat of burdensome differential taxation "can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* at 585.

The Massachusetts Supreme Judicial Court recently followed *Minneapolis Star* in invalidating a discriminatory tax scheme similar to the one here. *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991). The Massachusetts tax code had long given manufacturers an exemption from sales and use taxes for their purchases of machinery and materials. The code was then amended to deny the tax exemption to

newspaper publishers. The Massachusetts court recognized that, because "all manufacturers except newspaper publishers" received the tax exemption, this was the sort of differential taxation of the press that warranted strict scrutiny. *Id.* at 619-20. The court struck down the amendment as contrary to the First Amendment because the State could not adequately justify singling out the press.

The same First Amendment issue presented in *Minneapolis Star* and *Globe Newspapers* is presented here. This case, like those cases, involves a state tax scheme that is "facially discriminatory, singling out publications for [disparate] treatment" vis-a-vis all other manufacturers. *Minneapolis Star*, 460 U.S. at 581. Printing firms, unlike all other Florida manufacturers, are denied the benefits of the tax exemption for investments in capital equipment to start or expand a manufacturing facility.

Contrary to the conclusion of the court below, the mere inclusion of restaurants as well as printing firms in § 212.08(5)(b)5 does not save that provision from invalidation as a tax that singles out the press for discriminatory treatment. *Minneapolis Star*, in fact, implicitly rejected the very argument that the Florida court adopted here. In *Minneapolis Star*, the Minnesota tax code, like the Florida tax code here, discriminated against the press and in favor of all other manufacturers.[4] That said, the Minnesota tax scheme invalidated by the court treated the press just as it did another large class of businesses — service businesses that were required to pay a sales or use tax on the inputs that they purchased, but that were not required to pay a sales or use tax on the sales that they made to the public.[5]

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[4] *See* Minn. Stat. § 297A.14 (1982 ed.) (imposing use tax generally and specifically on the press); § 297A.25(h) (exemption from sales and uses taxes for "all materials . . . used or consumed in agricultural or industrial production of personal property intended to be sold ultimately at retail").

[5] *See* Minn. Stat. §§ 297A.14, 297.25(i) (exemption from sales and use tax on retail sales of publications).

However, because the press was not treated the same as other manufacturers, the tax on the press was held invalid. The same situation existed in *Globe Newspaper*, which held that newspapers could not be denied an exemption from the sales and use tax that applied to other manufacturers of tangible personal property, even though the exemption was also not available to non-manufacturing businesses. *See* 571 N.E.2d at 618. So, too, here, by treating the press less favorably than other manufacturers, § 212.08(5)(b)5 violates the First Amendment, without regard to whether the press is being treated similarly to restaurants or other non-manufacturing businesses. In these circumstances, *Minneapolis Star* and *Globe Newspaper* cannot be distinguished from this case.[6]

This Court's decisions under the Equal Protection Clause and the Commerce Clause confirm the correctness of the *Minneapolis Star-Globe Newspaper* approach and the error of the court below. In determining whether a tax is discriminatory in the equal protection context, this Court has considered whether the tax falls evenhandedly on members of the same "class." *See, e.g., Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 343 (1989) ("The Equal Protection Clause applies only to taxation which in fact bears unequally on persons or property *of the same class*.") (emphasis added) (internal quotation omitted). It is irrelevant whether members of different classes are taxed similarly. *See, e.g., Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 29-30 (1931) (recognizing that imposing same rate of tax on differently situated properties may be just as discriminatory as imposing different rates of tax on similarly situated properties).

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[6] The sole distinction between *Minneapolis Star* and this case is that here the denial of the tax exemption for other businesses appears in the same subsection of the tax code as the denial of the exemption for the press, whereas in *Minneapolis Star* the other businesses subject to the tax on inputs were never entitled to the exemption in the first place. This is a distinction without a difference.

This same approach is appropriately applied to determine whether a state tax statute does, in fact, "single out" the press in violation of the First Amendment when the statute applies to another industry in addition to the press. If the other industry is not in the same "class" as the press for any purpose relevant to the tax statute, the inclusion of the other business in the statute is, at best, irrelevant. (At worst, the inclusion of another industry that bears no similarity to the press may suggest that the statute was motivated not by any coherent economic rationale, but instead by a desire to discriminate against the press without running afoul of *Minneapolis Star*).

Accordingly, whether or not restaurants are subject to the same tax treatment as printing firms under § 212.08(5)(b)5 should have no bearing on the First Amendment analysis, because restaurants and printing firms are not members of the same class for purposes of taxation. Neither the Department of Revenue nor the court below has ever articulated any common characteristic of restaurants and printing firms that justifies denying them the tax exemption for the acquisition of new capital equipment. It is self-evident that these businesses are quite dissimilar. Printing firms are manufacturing businesses, whereas restaurants are service businesses. The United States Department of Commerce, for example, classifies printing as a "manufacturing industry," together with such industries as textile production, chemical manufacturing, automaking, and metal fabrication; in contrast, the Department of Commerce classifies restaurants as a "service industry." *See* United States Dep't of Commerce, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System* (RIMS II), M-22, 12 (2d ed. 1992).

Nor has the State or the court below articulated any common rationale for denying the tax exemption to printers and restaurants. They have suggested that the tax exemption was denied to the printing industry because it "is highly automated" (App. 8a) and thus may not be expected to generate many new jobs. This automation rationale does not apply, and is not even claimed to apply, to restaurants.

In the absence of any reason to conclude that printers are in the same class as restaurants for purposes of determining entitlement to the manufacturing equipment exemption, the constitutionality of the printing exception to that tax exemption should be determined without reference to the restaurant exception. Section 212.08(5)(b)5 should be viewed, in effect, as two separate tax provisions, not as one. It then becomes obvious that the printing exception, like the paper and ink tax in *Minneapolis Star* and the press exception to the tax exemption in *Globe Newspapers*, is a statute that singles out the press for disparate treatment. The Florida courts' decision to uphold the printing exception cannot, therefore, be reconciled with *Minneapolis Star* and *Globe Newspapers*.

The decision below also conflicts in principle with a long line of this Court's Commerce Clause decisions — the most recent of which is *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815 (1994) — that hold that discrimination against out-of-state businesses cannot be justified on the theory that some limited number of in-state businesses also bear a disparate burden.[7] In the First Amendment context, just as in the Commerce Clause context, the failure to completely eliminate discrimination between the disfavored class and the favored class should result in a finding of unconstitutionality. Indeed, given the strict scrutiny

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[7] *See, e.g., Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815 (1994) (striking down use tax in counties where it exceeded sales tax, even though use tax was lower than sales tax in other counties); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (striking down liquor tax that favored locally produced brandy and wine, despite the fact that some locally made liquors were also subject to the tax); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (striking down statute requiring that certain milk purchases be made from within four-county marketing area, despite the fact that statute also discriminated against in-state milk produced in other counties); *Brimmer v. Rebman*, 138 U.S. 78 (1891) (invalidating tax on meat slaughtered 100 miles or more from place of sale, though provision resulted in taxation of some in-state meat).

that applies to statutes challenged under the First Amendment for disfavoring the press, this result should be particularly obvious. A state should not be permitted to argue that discrimination against the press is constitutional simply because some small category of other businesses is similarly disfavored.

## II. THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

While this Court has had several opportunities to clarify the second component of *Minneapolis Star*, which deals with discrimination among members of the press, as the court below recognized, this Court has not yet had an opportunity to clarify the first component of *Minneapolis Star*, which deals with discrimination against the press. It is this aspect of *Minneapolis Star* that is particularly vital for assuring the continued independence of the press. This case offers the Court that opportunity.

A primary purpose of the adoption of the First Amendment was to protect the print press because of its contribution to American democracy. Thomas Jefferson, himself a frequent critic of the press, recognized its value when he stated, "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." 11 *The Papers of Thomas Jefferson* 49 (Boyd ed.) (1955).

This Court's decisions have repeatedly recognized the central role of a free press to "the American form of government." *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964); *see also New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (per curiam) (Black, J., concurring) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."). The Court has also long understood that press freedom may be endangered by unfair state taxation of the press. Sixty years ago, in invalidating a state tax on newspapers in *Grosjean v. American Press Co.*, the Court recounted at length the Framers' concern with taxation of

the press. 297 U.S. at 246. The Court found inescapable the conclusion that one of the central purposes of the First Amendment was to prevent such "taxes on knowledge" that curtailed the circulation of information critical to an informed citizenry. *Id.*; *see also Minneapolis Star*, 460 U.S. at 583-84 (discussing Framers' concern with the chilling effects of taxation on the press).

Today, the print press in the United States faces difficult times. The number of daily newspapers has declined by more than 200 since 1950.[8] Many believe that the print press can survive only by intensive automation, no matter how painful that process may be to the affected workers and jurisdictions.[9] If state and local governments are permitted to discourage that process by discriminatory taxation, the print press will be seriously disadvantaged.

The decision below opens the door nationwide to taxation schemes specifically designed to discriminate against the press. The Florida courts have indicated that all that a state need do in order to circumvent the requirements of *Minneapolis Star* is to impose the discriminatory tax on the press and one other industry. It makes no difference whether that other industry has anything in common with the press. If allowed to stand, the decision below will undermine *Minneapolis Star* and render illusory the First Amendment protection accorded the press from discriminatory state taxation.

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[8] Carol Felsenthal, *Two Former Reporters Offer A Primer On How Newspapers Work*, Chicago Tribune, Book Section, July 14, 1996, at 5.

[9] *See supra* page 3.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 30, 1996

# APPENDIX

SUPREME COURT OF FLORIDA

Monday, July 1, 1996

R. R. DONNELLEY & SONS COMPANY,

Petitioner,

v.

LAWRENCE H. FUCHS, etc., et al.,

Respondents.

CASE NO. 87,695

District Court of Appeal,
1st District - No. 95-769

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAWN, HARDING and ANSTEAD, JJ., concur
GRIMES, J., dissents

A True Copy

[Seal]

Sid J. White
Clerk, Supreme Court

BHP

cc: Hon. Jon S. Wheeler, Clerk
Hon. Dave Lang, Clerk
Hon. L. Ralph Smith, Judge

Mr. James M. Ervin, Jr.
Ms. Susan L. Turner
Ms. Maryann B. Gall
Mr. Todd S. Swatsler
Mr. Douglas M. Mansfield
Mr. Eric J. Taylor

THE DISTRICT COURT OF APPEAL FIRST DISTRICT,
STATE OF FLORIDA

R.R. DONNELLEY & SONS COMPANY,

*Appellant,*

v.

LAWRENCE H. FUCHS, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, and DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,

*Appellees.*

Not Final Until Time Expires To File Motion For Rehearing And Disposition Thereof If Filed

CASE NO. 95-769

Opinion filed March 5, 1996.

An appeal from the Circuit Court for Leon County.

L. Ralph Smith, Jr., Judge.

James M. Ervin, Jr. and Susan L. Turner of Holland & Knight, Tallahassee; Maryann B. Gall, and Todd S. Swatsler of Jones, Day, Reavis & Pogue, Columbus, Ohio, for appellant.

Robert A. Butterworth, Attorney General; Lealand L. McCharen, Assistant Attorney General; Eric J. Taylor, Assistant Attorney General, Tallahassee, for appellees.

WOLF, J.

R. R. Donnelley & Sons Company (Donnelley) appeals from a final order denying appellant's request for a refund of state sales taxes paid pursuant to section 212.08(5)(b), Florida Statutes, and declaring that the statute does not violate the Florida or federal constitutions. Donnelley claims (1) that section 212.08(5)(b)5.,

Florida Statutes, violates the freedom of the press guaranteed by the Florida and United States Constitutions; and (2) that section 212.08(5)(b)5. violates the Equal Protection Clauses of the Florida and United States Constitutions. We find no error in the trial court's determination that the statute is constitutional, and we affirm.

Donnelley is in the business of printing books, magazines, financial material, advertisements, telephone directories, and catalogs, with operations at 45 major printing sites in 24 states. In 1991, Donnelley opened a printing plant in South Daytona Beach, and expanded that plant in 1993. At both times, Donnelley purchased capital equipment. The appellant filed an application for statutory exemption from sales tax for the equipment purchases, which was denied by the Department of Revenue (department), pursuant to section 212.08(5)(b)5., Florida Statutes.

Florida imposes a sales and use tax on purchases of tangible personal property. It assesses a six percent sales tax on the price of tangible personal property sold at retail, *see* section 212.05(1)(a)1.a, and imposes a corresponding use tax on the price of tangible personal property that, while not purchased in Florida, is used there. *See* § 212.05(1)(b). Sections 212.08(5)(b)1. and (5)(b)2., Florida Statutes, provide for a refund of taxes paid for the purchase of machinery and equipment used to start an operation which manufactures taxable personal property for sale and a partial refund of taxes paid for the purchase of machinery and equipment used to expand a business which manufactures taxable personal property for sale. The plaintiff was found ineligible for this refund by the department, based upon section 212.08(5)(b)5., Florida Statutes. That section provides,

> [t]he exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid minerals severance, mining, or processing operations, oil or gas exploration or production operations, printing or publishing firms, any firm subject to regulation by

> the Division of Hotels and Restaurants of the Department of business and Professional Regulation, or any firm which does not manufacture, process, compound, or produce for sale, . . . items of tangible personal property.

On November 9, 1993, the appellant filed a complaint in circuit court challenging the validity of section 212.08(5)(b)5. under federal and state law. Appellant sought a declaratory judgment that section 212.08(5)(b)5. was constitutionally invalid, and sought a refund of all taxes paid under the provisions as well as attorney's fees and costs. Following a hearing on the matter, the trial court issued a written opinion upholding the statute in all respects.

In *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438 (1991), the United States Supreme Court addressed First Amendment concerns raised in regard to an Arkansas sales tax imposed on receipts from sales of goods and services which expressly exempted newspaper and magazine sales, but did not exempt cable television related services. While finding that a cable television operation is engaged in First Amendment-protected "speech," the Supreme Court held that the Arkansas tax did not run afoul of the First Amendment. The Court held that the tax did not (1) single out the press;[1] or (2) target a small group of speakers;[2] or (3) discriminate on the basis of content of speech.[3] The Court held,

> [t]he Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing

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[1] *Id.* at 1443 (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 244-249, 56 S. Ct. 444, ____, 80 L. Ed. 660, ___ (1936); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585, 103 S. Ct. 1365, ___, 75 L. Ed. 2d 295, ___ (1983)).

[2] *Id.* at 1443-1444 (citing *Minneapolis Star*, 460 U.S. at 575; *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S. Ct. 1722, ___, 95 L. Ed. 2d 209 (1987)).

[3] *Id.* at 1444 (citing *Grosjean*, 297 U.S. at 229-231).

> about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas's broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the first amendment.

Relying on *Leathers*, the Florida Supreme Court in *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992), found that Florida's chapter 212 sales tax is

> a tax of *general applicability* which applies to receipts from the sales of all tangible personal property unless specifically exempted, and *does not single out the press for special treatment.*

*Id.* at 461 (emphasis added). The court in that case concluded that Florida "may impose a generally applicable tax on the press without raising first amendment concerns." *Id.*

The appellant argues that section 212.08(5)(b)5. is not a generally applicable tax because it prohibits printers from obtaining an exemption that other manufacturers receive, and the exemption is a "printing tax" under which it has been singled out for taxation.

In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983), the Supreme Court discussed the potential evils of a tax that singles out a small portion of the press:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. *See Railway Express*

> *Agency v. New York*, 336 U.S. 106, 112-113, 69 S. Ct. 463, 467, 93 L. Ed. 533 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. *See generally*, Stewart, "Or of the Press," 26 Hasting L.J. 631, 634 (1975). "[A]n untrammeled press [is] a vital source of public information," *Grosjean*, 297 U.S., at 250, 56 S. Ct., at 449, and an informed public is the essence of working democracy.

*Id.* at 585.

In *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991), the Court recognized that the denial of an exemption to a tax of general applicability may also result in a violation of the First Amendment if it singles out the press. *See also Speiser v. Randall* , 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), holding that a denial of a tax exemption may result in a First Amendment violation.

The question before us is whether denial of the exemption affects a group of people so small as to be considered singling out the press for special treatment. Little guidance is provided in either the case law or the record in front of us as to when the group of people is so small as to when it constitutes differential treatment of the press. In the *Minneapolis Star and Tribune* case, it appears that the press was the only party subject to the tax. The same is true in *Globe Newspaper Co. v. Commissioner of Revenue, supra*. The statute in the instant case denies the tax exemption to not only printing or publishing firms, but also other businesses, such as mining, gas and oil exploration, restaurants, and utilities. While there is some dispute concerning the applicability to other groups, both sides concede that the exception also applies to the restaurant industry. We are

unwilling to rule that the statute on its face as a matter of law impermissibly singles out the printing industry. No proof has been presented concerning the size or the impact on the other parties who are denied the exemption. On the record before us, we, therefore, decline to find that the trial court erred in determining that the statute did not violate the First Amendment.

We also find appellant's equal protection argument to be unpersuasive. In *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1994), the Supreme Court addressed the appropriate test in determining whether the classification in a taxing statute is subject to a challenge based on equal protection.

In *Leathers, supra*, it was determined that subjecting one portion of the media to a tax while exempting another portion was not necessarily invalid. *See also Reiters America, Inc. v. Sharp*, 889 S.W.2d 646 (Tex. Ct. App. 1994). States are given great latitude in making the tax classifications, and the burden is very heavy on one who seeks to overturn such a classification. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1940). The most direct explication of this standard is found in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 309 (1910), in which the Supreme Court held,

> When the classification in such a law is called in question, *if any state of facts reasonably can be conceived that would sustain it*, the existence of *that state of facts at the time the law was enacted must be assumed*.

(Emphasis added).

Under this analysis, sections 212.08(5)(b)1., 2., and 5., Florida Statutes, fully meet equal protection standards. The Legislature could well have determined that certain businesses offered special advantages or benefits to Florida such as job creation, increased spending in local communities, improvement to quality of life in Florida, acting as a magnet to draw other businesses to Florida, or increasing tourist travel to Florida.

These would all be rational grounds for a decision to relieve a company of the imposition of the tax. The Legislature could also well have determined that printers did not offer a particular advantage or benefit to Florida, or that any benefit obtained would not offset the loss of revenue caused by an exemption. For example, a modern printing plant such as Donnelley's requires a large investment in machinery, but is highly automated. The Legislature could well have determined that this state of facts did not warrant extending the exemption to printing or publishing firms. In addition, printers, unlike other members of the media, produce tangible personal products. Thus, other media, such as radio and television, would not be eligible for the sales tax exemption contained in sections 212.08(5)(b)1. and 2. for they do not produce tangible personal products. The Legislature could have determined that one segment of the media should not receive preferential treatment. Thus, the Legislature's decision to exclude printers or publishers from the exemption contained in sections 212.08(5)(b)1. and 2., Florida Statutes, has a conceivable rational basis and does not violate the Equal Protection Clauses of the Florida and United States Constitutions.

MINER and VAN NORTWICK, JJ., concur.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

Case No. 93-4780
CIVIL DIVISION

R.R. DONNELLEY & SONS COMPANY,

Plaintiff,

vs.

LAWRENCE H. FUCHS,
Executive Director,
Department of Revenue of
the State of Florida; and
DEPARTMENT OF REVENUE OF
THE STATE OF FLORIDA,

Defendants.

_____/

**FINAL JUDGMENT**

THIS CAUSE came before the Court for final hearing, and the Court having considered the parties' stipulation of facts and memoranda of law and having heard argument of counsel for the respective parties, and being otherwise fully advised in the premises,

FINDS AND DECIDES as follows:

The uncontroverted facts in this case show that the plaintiff, R.R. Donnelley & Sons Company, is a large commercial printing firm with several printing plants throughout the United States and abroad. In 1990, the plaintiff acquired a site in Florida for the purpose of establishing its first printing operation in Florida. In preparation for the start-up of its Florida plant, the plaintiff purchased printing presses and other capital equipment and machinery for its new operation, at a cost of approximately $30

million. The plaintiff began operation at its Florida printing location in June of 1991.

On February 11, 1991, the plaintiff applied for the statutory exemption from sales tax for equipment purchases for new and expanding businesses, provided for by Section 212.08(5)(b), Florida Statutes. However, in March, 1991, the application was denied by the Department of Revenue, pursuant to Section 212.08(5)(b)5., Florida Statutes. Section 212.08(5)(b)5. specifically excludes certain businesses, including "printing or publishing firms," from eligibility for the sales tax exemption for equipment purchases. The plaintiff's application for a refund of the $1.8 million in sales tax paid on the equipment purchases was likewise denied by the Department in September, 1993. It is undisputed that at least some of the plaintiff's machinery and equipment purchases for the start-up of the Florida plant would have qualified for the sales tax exemption under Section 212.08(5)(b) 1., but for the exception for printing and publishing firms provided in Section 212.08(5)(b)5.

In 1993, the plaintiff purchased additional machinery and equipment in connection with its expansion of the Florida plant. Under the Department's application and interpretation of Section 212.08(5)(b)2., as limited by Section 212.08(5)(b)5, these purchases are also subject to sales tax.

Through its amended complaint, the plaintiff seeks a declaration by this court that Section 212.08(5)(b)5., Florida Statutes is an unconstitutional infringement upon the freedom of the press and denies the plaintiff equal protection under the laws by discriminating against print media. These alleged constitutional deprivations are the basis for the plaintiff's claim, under 42 U.S.C. § 1983, that the Director of the Department is liable to the plaintiff for a refund of the sales taxes paid by the plaintiff. The plaintiff also seeks attorney's fees under 42 U.S.C. § 1988. Alternatively, the plaintiff seeks a declaration that the statutory exception to the exemption from sales tax does not apply to the plaintiff because Donnelley is engaged only in printing, not printing *and* publishing. Finally, the plaintiff seeks to compel the

Department to determine the amount of the refund due to the plaintiff for the illegally or unconstitutionally imposed taxes.

Sections 212.08(5)(b)1. and (5)(b)2., Florida Statutes, provide for a refund of taxes paid for the purchase of machinery and equipment used to start an operation which manufactures taxable personal property for sale and a partial refund of taxes paid for the purchase of machinery and equipment used to expand a business which manufactures taxable personal property for sale. The plaintiff was found ineligible for this refund by the Department, based upon Section 212.08(5)(b)5., Florida Statutes. That section provides:

> The exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid minerals severance, mining or processing operations, oil or gas exploration or production operations, *printing or publishing firms*, any firm subject to regulation by the Division of Hotels and Restaurants of the Department of Business Regulation, or any firm which does not manufacture, process, compound, or produce for sale . . . items of tangible personal property.

(emphasis added).

The court rejects the Plaintiff's argument that the exception should be construed to apply only to firms which both print and publish, and therefore construed not to apply to the Plaintiff's printing firm. The phrase "printing or publishing firms" clearly applies to firms which print or publish, just as the other named businesses include oil exploration or production, gas exploration or production, phosphate mining, phosphate processing, other solid minerals mining, etc. The use of "or" in this case is not ambiguous and is therefore not subject to judicial construction.

The fact that the exception to the tax exemption in section 212.08(5)(b)5. subjects the plaintiff and other printing firms to Florida sales tax does not automatically render the exception an unconstitutional abridgement of the freedom of the press.

Florida's sales tax "is a tax of general applicability, which applies to receipts from the sales of all tangible personal property unless specifically exempted, and does not single out the press for special treatment." *Dept. of Revenue v. Magazine Publishers of America*, 604 So.2d 459, 461 (Fla. 1992). Even if, as the plaintiff argues, the exception results in different treatment between printers and other businesses, or between print media and other types of media such as television or radio companies, constitutional suspicions are raised only in certain circumstances.

Differential taxation of first amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints by (1) singling out the press, (2) targeting a small group of speakers, or (3) discriminating on the basis of content of the speech. *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed.2d 494 (1991). Under these circumstances, the government must show a compelling justification for the exercise of its taxing power in the manner challenged. However, if these circumstances are not present, the government's exercise of its taxing power is presumed to be constitutional, and this presumption can be overcome "only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes." *Leathers v. Medlock*, 113 L. Ed.2d 494 at 507 (citations omitted). In *Leathers v. Medlock*, the court found that rather than triggering the heightened scrutiny requiring the showing of a compelling justification by the State, the statute in question merely codified the Legislature's choice to exempt or exclude certain media from a generally applicable tax. The court found no indication that the statute was passed with the intent to censor expressive activities or that it was likely to "stifle the free exchange of ideas." 113 L. Ed.2d at 508. The court concluded that the tax on cable and satellite services, from which print media were exempt, did not violate the First Amendment.

In this case, it is clear that Section 212.08(5)(b)5. does not discriminate based on content, either directly or indirectly. *Compare, Dept. of Revenue v. Magazine Publishers of America*, 604 So.2d 459 (Fla. 1992). Likewise, it was not shown that the

exception applies only to a limited group of publishers, as was the case in *Minnesota Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed 2d 295 (1983). Therefore, in order to subject the exception to the strict scrutiny requiring a showing by the State of a compelling government interest, the plaintiff must show that the exception singles out the press for special treatment.

The plaintiff argues that the exception singles out the press because, although electric utility, communications, certain mining and production, and a few other types of businesses are specifically excepted from the tax exemption, the other businesses do not qualify for or do not need the exemption. Rather, it is the plaintiff's position that they are listed merely as a pretense to cover the singling out of the press for liability for sales tax on the purchase of equipment and machinery for a new or expanding business.

The court finds that the limitation on the exemption from certain sales and use taxes at issue here does not single out the press for special treatment. The exception does not compare to the special use tax imposed upon ink and paper used in publications in the case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed.2d 295 (1983) or the tax imposed upon the advertising receipts of publications with circulations over 20,000, which applied to only 13 of over 130 newspapers in the State of Louisiana, in *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936). As previously noted, the application of Florida's sales tax to printers and publishers does not constitute a singling out of the press for special treatment. *Dept. of Revenue v. Magazine Publishers of America*, 604 So.2d 459 (Fla. 1992). There is no evidence whatsoever that the exception threatens the free exchange of ideas or hinders the press as a First Amendment speaker. The exception to the exemption is not the imposition of a special tax, but merely a legislative limitation on an exemption from the generally applicable tax.

Because the exception does not single out the press, the statute in question is presumed to be constitutional absent "an additional basis" to support a finding that the statute violates the First Amendment. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233, 107 S. Ct. 1722, 95 L. Ed.2d 209 (1987). There has been no such additional basis shown in this case. The exception to the exemption is applied without reference to the content of the speech printed or published. There has been no demonstration that the exception was intended to suppress any ideas or that it actually has that effect. No evidence supports a finding that the exception was a deliberate device to penalize a certain group of printers or publishers. It can only be concluded that the selection of printing and publishing firms as one of the businesses excepted from the tax exemption was a matter of legislative policy and discretion. *See, Leathers v. Medlock, supra*, 113 L. Ed.2d at 507. The court finds no First Amendment violation in Section 212.08(5)(b)5., Florida Statutes.

The exception to the exemption does not violate the Plaintiff's right to equal protection under the laws. All printing firms and publishing firms are treated equally under the exception. In addition, the exception does not treat non-print media members differently that print-media members because the exception for new machinery applies only to producers of tangible personal property. The record in this case shows that no other media companies receive the exception. The plaintiff has not shown that the failure by the State to treat every new or expanding business, regardless of size, volume of business, nature of product, or other factors, equally with regard to the tax exemption is a hostile and oppressive discrimination. Therefore, the court finds no violation of equal protection requirements in the exception of printing firms and publishing firms from the sales tax exemption. *See Eastern Airlines, Inc. v. Dept. of Revenue*, 455 So.2d 311 (Fla. 1984).

Because the Court finds no constitutional infirmity in the exception challenged here, it need not address the Plaintiff's claim under 42 U.S.C Section 1983, or the Department's defenses thereto.

WHEREFORE, based on the foregoing, it is hereby ORDERED AND ADJUDGED that:

1. Sections 212.08(5)(b)1., (5)(b)2., and (5)(b)5., Florida Statutes, do not abridge freedom of speech or of the press, and therefore do not violate the Plaintiff's constitutional rights under the First Amendment to the United States Constitution or Article I, Section 4, of the Florida Constitution.

2. Sections 212.08(5)(b)1., (5)(b)2., and (5)(b)5., Florida Statutes, do not deny the Plaintiff equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, Section 2, of the Florida Constitution.

3. The Department of Revenue's denial of Plaintiff's application for refund of its purchases of machinery and equipment for its initial establishment of its printing operation in Florida pursuant to Section 212.08(5)(b), Florida Statutes, is upheld.

4. Because Plaintiff is not eligible for the refund it sought, it is declared that Plaintiff is likewise not entitled to a refund for taxes paid for its purchase of machinery and equipment and to expand its printing operation in Florida.

It is, therefore, ORDERED AND ADJUDGED that Plaintiff, R.R. DONNELLEY & SONS COMPANY, shall take nothing by its complaint, and the Defendants, LAWRENCE H. FUCHS, Executive Director, Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, shall go hence without day.

DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida, this 9th day of February, 1995.

/s/L. Ralph Smith, Jr.
L. RALPH SMITH, JR.
Circuit Judge

# CONSTITUTIONAL AND STATUTORY PROVISIONS

## UNITED STATES CONSTITUTION

**Amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## FLORIDA STATUTES: TAXATION AND FINANCE

**212.05. Sales, storage, use tax**

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1. a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

* * * *

(b) At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.

* * * *

**212.08. Sales, rental, use, consumption, distribution, and storage tax; specified exemptions**

The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following are hereby specifically exempt from the tax imposed by this part.

* * * *

**(5) Exemptions; account of use.—**

* * * *

(b) *Machinery and equipment used to increase productive output.—*

1. Industrial machinery and equipment purchased for use in new businesses which manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property at fixed locations are exempt from the tax imposed by this chapter upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used in a new business in this state. Such purchases must be made prior to the date the business first begins its productive operations, and delivery of the purchased item must be made within 12 months of that date.

2. Industrial machinery and equipment purchased for use in expanding manufacturing facilities or plant units which manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property at fixed locations in this state are exempt from any amount of tax imposed by this chapter in excess of $100,000 per calendar year upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used to increase the productive output of such expanded business by not less than 10 percent.

* * * *

5. The exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid mineral severance, mining, or processing operations, oil or gas exploration or production operations,

printing or publishing firms, any firm subject to regulation by the Division of Hotels and Restaurants of the Department of Business and Professional Regulation, or any firm which does not manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property.

* * * *